NOS. 15225 - 15226

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES S. THOMAS, Assistant Secretary of Defense for the Navy, et al.,
Appellant,

vs.

UNITED STATES OF AMERICA on the Relation of Peter J. Smith,
Appellee.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy; CAPT J. J. GREYTAK, U. S. Navy, et al.,
Appellant,

vs.

UNITED STATES, ex rel LOUIS V. BOSCOLA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANTS

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JURISDICTION

Jurisdiction lay in the District Court under 28 U.S.C. 2241 and lies in this Court under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Insofar as this appeal is concerned, the operative facts in the court below are identical. Appellees Boscola and Smith were both, on all pertinent dates, *retired* enlisted men of the *regular* United States Navy. While the District Judge's decision made no point of it, it should be clearly understood that neither was (immediately prior to the significant events) on active duty, neither was nor ever had been a reservist as the term is commonly used to indicate a non-regular, non-career member of the armed forces, and both were entitled to and were drawing such retired pay as was pertinent to their rank and retired status. At a time before the events giving rise to this appeal, appellees committed separate crimes against the State of Washington and after judicial proceedings were incarcerated in the penitentiary. Appellees were called to active duty to effect their court-martial (appellants specifically do not concede that such call to active service was necessary to make petitioners amenable to court-martial), on January 31, 1956, by the Secretary of the Navy under 34 U.S.C. 433 and proceeded to a naval station at Seattle, Washington, where they were situated when this action commenced.

Appellees promptly sought their release from military jurisdiction by way of habeas corpus, alleg-

ing *inter alia* that they were not amenable to the impending court-martial, that trial by court-martial would subject them to double jeopardy, and a number of other averments not here material.

Hearings were had and evidence was offered. From the multiple averments of appellees, the District Judge considered only that contention that appellees had been unlawfully (*i.e.*, without authority of law) ordered to active duty. Appellants having conceded that *if* appellees were unlawfully in active service they were being restrained of their liberty insofar as they were compelled by military orders to remain at a fixed point, obey orders, etc., the District Judge sustained the writ and ordered appellees released from active duty (R. 41; R. 47).

QUESTIONS ON APPEAL

Appellants contend that:

I

The District Judge had no right to take evidence on the purpose for which appellees were ordered to active duty.

II

If the District Judge had a right to take evidence on the purpose for which appellees were ordered to

active duty, he erred in his construction of the terms "active duty", "active service", and "duty".

ARGUMENT AND AUTHORITIES

I

The District Judge had no right to take evidence on the purpose for which appellees were ordered to active duty.

The matter of recalling appellees to active duty being one of executive discretion, the District Judge had no power to review same or to inquire into its motivation.

In *Dakota Telephone Co.* v. *South Dakota,* 250 U. S. 163, 63 L.Ed. 910, 39 S.Ct. 507 (1919), at 184 the Supreme Court passed upon an exercise of "war power" by the President and said, ". . . indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but . . . abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. . . . as this court has often pointed out, the judicial may not invade the . . . executive . . . to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

It is apparent from the Memorandum Opinion, especially R. 32 *et seq*, that the District Judge distinguished *U. S. ex rel Pasela* v. *Fenno* (C.A. - 2d; 1948), 167 F. 2d 593, on the ground that there a statute authorizing recall by the Secretary of the Navy without qualification of the power was involved while in the instant case he found a limitation on the *carte blanche* in the words "for such duty [etc.]" and therefore felt called upon to inquire into the motives and duty contemplated. Appellants feel that a similar *carte blanche* exists in 34 U.S.C. 433 and the District Judge erred in finding a justiciable limitation. If appellants be correct and there was full administrative discretion, the District Court had no jurisdiction to review it.

Applicable law on January 31, 1956, concerning the recall of retired enlisted persons of the Regular Navy was contained in the Act of March 3, 1915, as amended by the Act of August 29, 1916, codified as 34 U.S.C. 433 and read, in part, as follows:

> "The Secretary of the Navy is authorized . . . when a national emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. [pay, etc.]"

In the instant case it was conceded that the Secretary of the Navy had called appellees to active duty; that appellees were retired enlisted men; and the Dis-

trict Judge assumed "without conceding" (R. 31, line 27) that a national emergency existed. It was stipulated by appellants (R. 52) that ". . . the purpose of recalling the Petitioner[s] to active duty was for the purpose of court-martial" but its relevancy and materiality was denied. (The words "accordion concert" at R. 52 should read "Gordian knot" but the error was discovered too late.)

But appellants maintained at the hearing in the court below and continue to maintain that the District Court, if the power to recall reposed in the Secretary of the Navy, had no right to examine the motives which prompted the orders or the duty contemplated. We must assume that the District Judge intended to limit his decision to the *motive* for he so said in his Memorandum Opinion (R. 34, line 18), "Here we are concerned with the lawfulness of the recall to duty and not with an assignment to duty after lawful induction or recall" and again (R. 35, line 11) " . . . the Navy may not lawfully order . . . to active duty under a statute clearly anticipating a recall for the performance of further duty as a guise for an unrelated purpose [court-martial] . . ." Similarly, the Findings of Fact re Boscola (R. 38, line 14) ". . . show that petitioner was not recalled . . . for any particular duty . . . was recalled ostensibly for active duty, but in reality for no duty, and actually to ac-

complish an undesirable discharge." Findings re Smith (R. 44, line 23) contain essentially the same recitals.

Being confronted then squarely with a question of motivation, we deny the propriety of the District Judge's inquiry into the motive of the Executive branch. The *Dakota* case, *supra*, would appear to be authority squarely *contra*.

We must, however, determine whether the Secretary of the Navy really has *carte blanche* in this matter or whether the words "for such duty [etc.]" impose some limitation falling short of complete discretion.

The case of *Denby* v. *Berry*, 263 U. S. 29, 68 L.Ed. 148, 44 S.Ct. 74 (1923), would appear to be squarely in point here. In that case, the question arose as to the propriety of judicial review of the discretion of the Secretary of the Navy in ordering a Naval Reserve officer to inactive status under the Act of August 29, 1916, 39 Stat. 556. The Supreme Court in construing that law said at p. 33:

> "It is quite evident from the foregoing that members of this [naval reserve] force occupied two statuses, one that of inactive duty, and the other of active service. It is further clear that it was within the power of . . . the Secretary of the Navy . . . to change . . . from one status to the other. . . . How this should be done, was within

> the discretion of the . . . Secretary. . . . Orders [changing status] . . . were clearly within the power of the . . . Secretary of the Navy . . . [34] Nowhere is there found any limitation upon the discretion of the Executive in this regard. . . . [36] Because the Secretary gave [cf. had] a wrong reason for his action is not a ground for requiring him . . . to revoke the order . . . if he had discretion to do this [change status], as we have found he did have."

In citing *Denby*, we assume that we shall be met by the same objection as that raised in the Memorandum Opinion, to wit: that the *Denby* law gave unqualified discretion to the Secretary and that 34 U.S.C. 433 does not. We contend that the *Denby* statute and 34 U.S.C. 433 are essentially the same and to be construed *pari ratione* and in support we examine the matter historically.

Before the Act of March 3, 1915, 38 Stat. 928, there was, apparently, no method of augmenting the enlisted naval forces by other means than new enlistments. There were no enlisted reservists of any type as we now know them. Enlisted persons who served thirty years were retired and owed no further obligation while those who served less than thirty were simply separated. Regardless of how they left the Navy, their training was lost unless they returned to the colors voluntarily.

The Act of March 3, 1915, was an appropriation bill and covered 38 Stat. 928 - 953. At page 940 (third full paragraph) the Act said "There is hereby established a United States naval reserve . . ." and approximately one and one-half pages outlined such. Important was the provision that it be composed of former service men (*i.e.*, former regulars — NOT week-end warriors as we know a naval reservist primarily today) and it further provided at page 940 (fourth full paragraph) "Enlistments . . . [barred] unless he be found to be physically fit to perform the duties of the rating in which last discharged . . ."

There were provisions at page 941 for war service, "In time of war they may be required to perform active service with the Navy . . ." From the quoted section concerning physical qualifications, it may be presumed that such persons would be qualified for general duty without restriction or would have been separated from the reserve.

Immediately following these provisions concerning the naval reserve was a provision on page 941 (sixth full paragraph) which read, "The Secretary . . . call any enlisted man on the retired list into active service for such duty as he may be able to perform."

When read in context, the reason for the phrase "for such duty as he may be able to perform" to which

the District Judge adverted so markedly in his Memorandum Opinion (R. 31 - 32) becomes apparent. The reservist as described above was, by law, either physically qualified for general duty or he would not have been a reservist. The retired person, on the other hand, might have been so retired because he had completed thirty years service *or even because he was physically disabled.* In either case, he would remain on the retired rolls until death. Further physical disability or a continuation of that for which he was retired would not remove him therefrom. The phrase "for such duty as he may be able to perform" must have been intended solely to protect the rights of the United States to recall these men even though they might be capable of only limited service — not to require the United States to assign them to duty. Read in context it becomes clear that no limitation on the Navy was intended but the sole intention of Congress was to render retired personnel liable to recall in time of war despite the fact that they might not be fully qualified physically.

If we are to speculate as to what Congress intended when passing the Act of March 3, 1915, as the court did (R. 32, line 12 *et seq*), how much more reasonable is the foregoing explanation. Why should Congress have committed the redundancy of saying that retired persons might be ordered to "active service" for "duty" and omitted such redundancy as to reservists?

Can it be said that Congress meant to limit the Secretary's discretion as to retired people and allow him a free hand as to reservists? Yet the reasoning of the Memorandum Opinion would force us to such a preposterous conclusion. Herein lies the fallacy of interpreting code sections removed from context.

The Act of March 3, 1915, was followed by the Act of August 29, 1916, which was the law construed in *Denby, supra.* This, too, was an appropriation act encompassing 39 Stat. 556 - 619. Pages 587 - 600 were devoted to establishment of the "Naval Reserve Force" and went into much more detail than the act of the previous year. Provision was made in this law for the various "civilian" reserves as we now know them and the former-regular reserve was continued. At page 591 (second full paragraph) the provision for recall of retired enlisted men was repeated in identical words except that authority in time of "national emergency" was added. Appellants submit what must be plain, *i.e.*, that Congress changed nothing except to expand the time when the Secretary's power might be invoked. If then no limitation on discretion was intended in the Act of 1915, such absolute discretion continued in the Act of 1916 and was a part of the same law construed by the Supreme Court in *Denby, supra.*

To support further the view that the discretion is absolute we cite the only history of the Act of 1915 which we have discovered, the House Committee on Naval Affairs Report 1287, 63rd Congress, 3rd Session, January 16, 1915:

> "Provision is made for the calling of enlisted men on the retired list into the active service in time of war. Existing laws provide for the retirement of enlisted men after 30 years service, but make no provision for their active employment in time of war, as in the case of officers placed on the retired list of the Navy."

Reading this report, scant as it may be, reveals nothing but an affirmative intent on the part of Congress to authorize a control by the Navy, hitherto nonexistent, over retired enlisted men — not an intention to limit such power.

While admittedly hindsight is of little value in construing a law, it should be noted that the Act of August 10, 1956, 70A Statutes at Large codified the tremendous bulk of existing military law. *It made no new law* (Senate Report No. 2484, 84th Congress, 2nd Session, p. 19).

10 U.S.C. 6482, 70A Stat. 417 replaces 34 U.S.C. 433 and reads:

> "In time of war or national emergency the Secretary of the Navy may order to active duty any

retired enlisted member of the Regular Navy . . ."

The omission of the words "for such duty as he may be able to perform" is explained on page 497 of the cited report:

> "The words 'for such service [duty] as he may be able to perform' are *omitted as surplusage* [*i.s.*] . . ."

For whatever value the opinion of the recent Congress may have, it is apparent that it attached no such significance to the words as did the District Court.

Appellants submit that Congress in the Act of 1915 intended to confer absolute discretion upon the Secretary of the Navy. The legislative history, examination of the text of the statutes, and the *Denby* case prove this assertion. That being the case, the *Dakota* case, *supra* is authority for the rule that such action and its underlying motive is beyond judicial review.

For other cases holding that military discretion will not be reviewed by the courts we cite the following:

a. *Nordmann* v. *Woodring* (D.C.-Okla.; 1939), 28 F. Supp. 573 at 574—"This court has no power to review the orders of the commanding officer of the Army unless Congress vested the court with such power."

b. *Ainsworth* v. *Barn Ballroom Co., Inc.* (C.A.-4th; 1946), 157 F. 2d 97—The Fourth Circuit reversed the Eastern District of Virginia which had enjoined an armed forces commander from posting "off limits" sentries before a dancehall. The court cited *Dakota, supra* and said at 100: "If the order was within the discretionary authority of the heads of the War and Navy Departments . . . as has been pointed out time and again, the courts may not invade the executive departments to correct alleged mistakes arising out of abuse of discretion."

c. *Harper* v. *Jones* (C.A.-10th; 1952), 195 F. 2d 705—Action to enjoin a military commander from placing an auto dealer "off limits" under authority which permitted him to place establishments off limits "for the purpose of maintaining discipline and to safeguard the health and welfare of military personnel". The actual reason for the off limits order was the belief that the auto dealer had cheated a member of the command and had refused to comply with an order to refund "or else". The District Court enjoined (98 F. Supp. 460) stating that the order was not for discipline, health and welfare. The Court of Appeals reversed stating at 707, "What is necessary for the discipline of military personnel and to safeguard their health and welfare is to be determined by the commanding officers and not the courts." The action of this

Court of Appeals makes it clear that the courts will not examine the motives if the power exists.

d. *U. S.* v. *Litchfield* (D.C.-Me.; 1956), 144 F. Supp. 437—Action by U. S. to recover alleged overpayments. Defendant had been ordered to "active duty" instead of "training duty" in order that he might qualify for certain benefits. He became ill and was hospitalized and paid for a long period of time. U. S. sued to recover salary payments over and above those which would have been authorized under "training duty" on the ground that it was *intended* that his active duty should be co-terminal in point of time with the "training duty" which might have been ordered. The District Court in denying recovery said (at 440), "Hence, where an order, such as the one in question, is patently valid, it is the opinion of this Court that it does not have the power to review the motives and unexpressed intentions of the superior officer regarding that order. [cases] Whatever may have been his motives and intentions in directing the defendant to active duty, as distinguished from active training duty, are, therefore, immaterial to this action."

In concluding this portion of our brief we still feel that the reasoning of the Second Circuit in *U. S. ex rel Pasela* v. *Fenno* (C.A.-2d; 1948), 167 F. 2d 593, is highly persuasive. The recall for court-martial in

that case was under an unqualified reserve statute and the court said, at 594: "Thus appellant could lawfully be recalled to active duty, nothing in the statute or legislative history indicating that a call to active duty solely for purposes of court-martial proceedings is not permissible."

We feel that the statute in this case is likewise unqualified insofar as it may have been construed to impose a limitation on the Secretary's power. That being the case, the orders to active duty to appellees were an exercise of executive discretion and not open to review by the court.

II

If the District Judge had a right to take evidence on the purpose for which appellees were ordered to active duty, he erred in his construction of the terms "active duty", "active service", and "duty".

It would appear from the Memorandum Opinion (R. 32, lines 14 - 27; R. 35, lines 10 - 19) that the District Judge, to put it succinctly, does not consider that awaiting court-martial is "performing duty" or "duty". He adheres to this belief while quoting (R. 33) the *Pasela* statute which said (line 16) "may be required to perform active duty" but finds that this language "varies substantially" (line 31) from "such duty as he may be able to perform." We cannot agree.

We feel that if Pasela was "perform[ing] active duty" while awaiting court-martial and undergoing such (and the Second Circuit apparently so felt), then Boscola and Smith were rendering "such duty as [they] may be able to perform" while awaiting court-martial.

The crux of the matter, of course, is the definition of "duty". As is said in *Litchfield, supra* at 439: "Because the consequences of active duty differ vastly from active or inactive training duty, the terms designating the type of duty are employed *with precision, as words of art* [*i.s.*], in the statutes, regulations and military orders." Appellants do not feel that the District Court construed the term "duty" as a word of art and erred in that respect. The petition of Boscola (R. 3 - 8) does not raise the point at all. The petition of Smith (R. 10 - 14) raises the point only in a general way (R. 13, lines 3 - 5). It was only in the Memorandum Opinion (R. 32, line 12 *et seq*) after all arguments were concluded that its importance became apparent. No opportunity existed to inform the District Judge as to what the armed forces meant by "duty".

It may be stated as almost a legal truism that "The practical interpretation of an ambiguous or uncertain statute by the executive department charged

with its administration or enforcement is entitled to the highest respect from the courts, especially when long-continued and uniform. . . ." 42 *Am. Jur.* "Public Administrative Law", § 78, page 392 - 3. The footnote citations in support of this proposition number literally hundreds and leave little to choose between. Be it enough to say that they all indorse the general proposition, but none are specifically in point.

While the District Judge's approach is negative, *i.e.*, that Boscola and Smith were not performing duty, we feel that a fair inference from his Opinion and Findings (R. 38; R. 44) is that the Judge feels that a status of doing something affirmative rather than waiting would be performing duty. The armed forces approach to the matter has always been, "They also serve who only stand and wait." Examples of such interpretation follow.

a. Opinions of the Judge Advocate General of the Navy, No. 85, April 30, 1952—An officer on active duty was restricted to his base and was killed in an auto accident off the base. *Held,* not in line of duty since "restriction constituted a specific duty assignment."

b. Bureau of Naval Personnel Manual, Article 5409—Requires that transfer orders to a brig (jail) or retraining command show *inter alia* "NATURE OF

DUTY" as "(number) days confinement at (name of confining activity)."

c. Winthrop, *Military Law and Precedents*, 1920, page 614—"What is military duty. The term 'duty' . . . means of course military duty. But — it is important to note — every duty which an officer or soldier is legally required by superior military authority, to execute, and for the proper execution of which he is answerable to such authority is necessarily a military duty . . ."

Scant as the foregoing references may be, we feel that they demonstrate that the armed forces interpretation of "duty" means simply being in service and doing as one is told, be it much or little. Especially pertinent is "a", *supra* wherein the Navy held that "restriction", a status very similar to that of Boscola and Smith, was "a specific duty assignment."

We turn next to statutory definitions by Congress. They are admittedly specialized but we can find no better.

a. Act of May 4, 1948, 62 Stat. 208—An act to reimburse persons in the Navy for privately procured medical expenses if (1) no government facilities were available, and (2) "the person receiving the service is in a duty status." Section 3 of the act provides

"For the purpose of this Act, a person . . . in a duty status . . . while on authorized liberty or leave."

If the Congress felt, although admittedly for this statute, that leave was a duty status, surely being at a naval station available for orders (whether to appear before a court-martial or something else) is "duty".

b. Act of July 9, 1952, 66 Stat. 481—Defines "duty" (for reservists) as "military service *of any nature* [*i.s.*] under orders or authorization issued by competent authority."

Under this act, the mere status of being alive and under military control ("of any nature") constitutes "duty" insofar as Congress is concerned. A more far-reaching definition could scarcely be imagined and as long as Boscola and Smith were alive and did as they were told under military direction, they performed duty.

Lastly we turn to the courts for the times they have construed the term "duty". While the Tort Claims Act uses the phrase "in line of duty" we have found no assistance in such cases, primarily, we believe, because they are concerned with the rights of third parties. We have, however, found the following:

a. *U. S.* v. *Williamson*, 90 U. S. 411, 23 L.Ed.

89 (1874) is very nearly in point and we shall analyze it at length.

Captain Williamson sued for his full pay and the United States defended under a statute which provided, "That any officer absent from duty with leave [inapplicable exceptions] shall . . . receive . . . half . . . pay . . . ." Plaintiff, at the close of the Civil War when many officers were surplus, elected to be ordered to ". . . proceed to his home and await orders . . .", presumably until a vacancy became available. The position of defendant United States was that he was "absent from duty with leave" and did not fall within the exceptions.

The Supreme Court held for plaintiff saying (at 415):

> "While absent from duty 'with leave,' the officer is at liberty to go where he will [etc.] . . . The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place and to remain at that place. He cannot go elsewhere; he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to [fight, march, etc.] . . . [416] The power to make this assignment was a portion of the executive authority . . . [plaintiff] was not only justified in obeying this order, but it was his duty to obey it. It was his duty to proceed at once to his home, there to remain, subject to orders to be communicated to him."

It is clear from this opinion that the Supreme Court felt that Captain Williamson was "on duty" or "performing duty" although he was doing nothing except holding himself available for orders. A closer analogy to Boscola and Smith could scarcely be imagined.

b. *Rabinowitz* v. *U. S.* (C.A.-3rd; 1932), 60 F. 2d 458—Action to recover medical expenses paid by a soldier under a statute (at 459) "When . . . on duty where there is no officer, he * * * may arrange for the required service." The soldier was on detached service where there was no military station and returned to his home in a different city each night. He became ill at home and incurred medical expenses. The United States defended alleging plaintiff was "off duty" when ill. The court held (at 460), "If Rabinowitz had been taken ill in barracks . . . he unquestionably would have been considered 'on duty' during his illness."

Again we note a court opinion holding that "on duty" is not synonymous with "doing something".

c. *Terry* v. *U. S.* (Ct. Cl. - 1951), 97 F. Supp. 804—Action to recover pay. Defended by United States on ground that, while hospitalized, plaintiff had been placed on and used up "terminal leave" and therefore had been paid in full for duty and leave time leav-

ing no balance owing. The court granted judgment for plaintiff, saying (at 807) "This court held in 1904 that if an officer or soldier was subject to the orders of superior authority, whether [he] did *much or little or any duty* [*i.s.*] . . . then [he] was not on furlough [leave]. . . . The only inference possible . . . is that an officer . . . is on duty in the sense that he is under immediate supervision, may be called upon to perform such work as he is able, must wear prescribed garments, may leave the hospital only with the permission of the commanding officer, and is subject to the orders and discipline of the hospital staff."

Eliminating the references to hospitalization, this is almost exactly the situation in which Boscola and Smith were placed.

We conclude therefore that, if the District Judge was authorized to determine the duty status of appellees, he erred in concluding that a military person who is doing no specific work assignment but who is on active duty and subject to orders, is not "performing duty".

CONCLUSION

For the foregoing reasons appellants respectfully submit that these cases should be remanded to the District Court with directions to dismiss the writs and to order appellees to return to the active duty status from which the judgments of the District Court relieved them.

Respectfully submitted,

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